No. 7648

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellant,

vs.

OSCAR E. SAMPSON,

Appellee.

On Appeal from the District Court of the United States for the District of Montana.

BRIEF FOR THE APPELLEE

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STATEMENT OF THE CASE.

Appellee controverts that portion of Appellant's statement of the case appearing on page 2, wherein it is stated:

> "At the conclusion of the introduction of plaintiff's evidence, the court overruled a motion of the defendant to direct the jury to return a verdict in its favor because the plaintiff had not introduced substantial evidence tending to support the allegations of his complaint. This motion was renewed and overruled at the close of all the evidence. To these rulings of the court, defendant duly and timely reserved exceptions."

Such a motion was made at the close of the plaintiff's evidence, but was not renewed at the close of all the evidence. No opportunity whatever was given to the Court to pass upon this question at the close of the evidence unless it be implied from the fact that

Appellant submitted a series of five instructions handed to the Court after the argument in the cause was about to begin, or after it had begun, one of which was worded as follows:

> "You are instructed to find your verdict for the defendant in this case."

As disclosed by the Record, at the close of the testimony no motion whatever was made (R. p. 153). Written instructions were thereafter submitted to the Court, but for all the record disclosed they may have been submitted even after the argument. It is clear, however, that no ruling was made by the Court until after the argument and the charge to the Jury, and the only rule made by the Court is implied in the fact that the Court failed to give the requested instructions (R. p. 157 to 170). Whereupon, exception was taken to the Court's failure to grant said instruction (R. p. 170).

ARGUMENT.

Record Fails to Disclose Bill of Exceptions Was Lodged and Settled Within the Time Required by Rules of Court.

The verdict of the jury herein was rendered on the 17th day of May, 1934 (R. p. 170). The bill of exceptions was settled and allowed on September 14, 1934 (R. p. 172). It was not lodged or presented for settlement prior to some date in August, 1934 (R. p. 171). There appears at the end of the bill of exceptions a statement by counsel dated as follows: "..... day of August, 1934." Wherein counsel recites:

"That by orders duly given and made and entered of record pursuant to stipulation of parties to the above entitled action, the defendant above named, the United States of America, was given and granted up to and including the 15th day of September, 1934, in which to prepare, serve and file its bill of exceptions herein."

Nowhere have such orders or stipulations been incorporated in the bill of exceptions.

This Court has heretofore emphatically stated that similar orders must be incorporated in the bill of exceptions at the time it is settled and allowed, and that they cannot be considered if incorporated in the record or certified up at a later date. With reference to the extension of the term, and the settling of the bill within the term, this Court has said:

"Under these circumstances the bill of exceptions should show that the term was extended and the bill settled during the term so extended, as it must affirmatively appear from the record that the trial court had jurisdiction to approve the bill of exceptions."

United States vs. Payne, 72 Fed. (2d) 593.

Certainly if the orders there considered must be incorporated in the bill of exceptions before this Court will take cognizance thereof, it is not sufficient to take the mere statement of counsel that orders were made extending the time for service of the bill of exceptions. The orders themselves, under this decision, must be made a part of the bill of exceptions.

Incidentally the record fails to disclose any service of the bill of exceptions upon counsel for the Appellee within the time allowed by the rules of Court, or within the time to which it was extended. There is an undated stipulation in the record, however, stipulating that the

same might be settled and allowed as a true bill of exceptions. Whether that was signed before or after settling is not disclosed by the bill of exceptions because the same is undated (R. p. 172).

The rules of the District Court of the United States, in and for the District of Montana, which are applicable to this situation, are rules 75 and 81, both of which rules were promulgated and approved by the Honorable William H. Hunt, then District Judge of the District of Montana, the Honorable William B. Gilbert, the Honorable Erskine N. Ross and the Honorable William M. Morrow, then Circuit Judges of the United States for the Ninth Judicial Circuit, by the promulgation of an order bearing date the 4th day of March, 1905 over their signature. Said rules are in words and figures as follows:

"RULE 75.—BILLS OF EXCEPTIONS.—A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at the time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial, by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the Clerk.

If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial, within ten days after the rendition of the verdict, or, if the case was tried without a jury or if the matter or proceeding submitted be taken under advisement within ten days after written notice of the rendition of the decision, serve

upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendment shall within five days thereafter be delivered by the proposing party to the Clerk for the Judge. The Clerk must, as soon as practicable thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill; and the Clerk must, as soon as practicable, thereafter notify or inform both parties of the time so designated by the Judge. In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant, and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the Clerk.

"RULE 81.—EXTENSIONS OF TIME.—When an act to be done in any action at law or suit in equity which may at any time be pending in this Court, relates to the pleadings in the cause, or the undertakings or bonds to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the giving of notices of motion, the time allowed by these rules may, unless otherwise specially provided, be extended by the Court or Judge by order made before the expiration of such time; but no such extension or extensions shall exceed thirty days in all, without the consent of the adverse party; nor shall any such extension be granted if time to do the act or take

the proceeding has previously been extended for thirty days by stipulation of the adverse party; and any extension by previous stipulation or order shall be deducted from the thirty days provided for by this rule. It shall be the duty of every party, attorney, solicitor, or counsel, or other person applying to the Court or Judge for an extension of time under this rule, to disclose the existence of any and all extensions to do such act or take such proceeding which have previously been obtained from the adverse party or granted by the Court or Judge; and any extension obtained from the Court or Judge in contravention of this rule shall be absolutely null and void, and may be disregarded by the adverse party. Nothing herein contained shall interfere with the power of the Court to extend the time to do an act or take a proceeding in any cause until after some event shall have happened or some step in the cause shall have been taken by the adverse party."

Heretofore, and herein, the Appellee has made a formal motion to strike the bill of exceptions from the record herein upon the grounds urged in this brief. Though the Motion may not be granted, the matters contained in said bill of exceptions should not be considered because said bill of exceptions has failed to disclose that it was properly prepared, served, lodged, settled and allowed.

If the settlement and allowance of a bill of exceptions is to be considered a matter purely of procedure, and that the law of the state under the Conformity Act would apply, then, under the laws of the State of Montana, the record fails to disclose that the lower court had jurisdiction to settle and allow the bill of exceptions on the date it was settled and allowed.

Section 9390 of the Revised Codes of Montana, 1921,

in so far as it is applicable and necessary to the decision herein, is in words and figures as follows, to-wit:

"EXCEPTIONS NOT PRESENTED AT TIME OF RULING—NOTICE TO ADVERSE PARTY, HOW SETTLED UPON, ETC. Whenever a motion for a new trial is pending, no bill of exceptions need be prepared or settled until the decision of the court upon motion for a new trial has been rendered, but a bill shall be prepared and settled in the same manner and within the same length of time after the decision on the motion for a new trial as hereinafter provided for the making and settling of bills of exceptions. Except as above provided, the party appealing from a final judgment, if he desires to present on appeal the proceedings had at the trial, must, within fifteen days after the entry of judgment if the action was tried with a jury or after receiving notice of the entry of judgment if the action was tried without a jury, or within such further time as the court or judge thereof may allow, not to exceed sixty days, except upon affidavit showing the necessity for further time, prepare and file with the clerk of the court and serve upon the adverse party a bill of exceptions, containing all of the proceedings had at the trial upon which he relies."

Failure to serve, file and settle a bill of exceptions within the time is jurisdictional, and the Court loses jurisdiction to settle a bill of exceptions unless the provisions of the statute are complied with.

Stabler vs. Adamson, 73 Mont. 490, 237 Pac. 483.

ABANDONMENT OF ERRORS ASSIGNED.

Appellant specifically abandoned his assigned errors numbered XVI and XIX. (*Brief of Appellant, page 3.*)

By his failure to set forth, among his specifications of error in his brief, Appellant has abandoned his assigned errors numbered I, III, VIII, IX, X, XI,

XIII, XIV, XV, XVI, and XVIII. The rules of this Court specifically require of the Appellant the setting out of the "specifications of error relied upon, which in case brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged;" (*Rules of the Circuit Court of Appeals, Ninth Circuit, Rule 24.*)

This rule is a rule not unique to this Circuit, but the exact wording has been incorporated in the rules of most Courts. It is likewise Subsection "B" of Subdivision 2 of Rule 24 of the Eighth Circuit (150 Fed. XXXIII). The Supreme Court of the United States in Subsection "E" of Subdivision 2 of Rule 24, has a similar provision. The Courts have uniformly required a strict compliance with this rule, and where Appellant has failed to set forth in his specifications of error in his brief, with appropriate reference to the Record, the assignments of error that he intends to urge, the Courts have dismissed the appeal, and where only some of the assignments of error have been set forth in the specifications of error, the Courts will consider only those that are set forth in the specifications of error.

Lohman vs. Stockyards Loan Co., 243 Fed. 517;
City of Goldfield Colo. vs. Roger, 249 Fed. 39;
Moline Trust & Savings Bank vs. Wylie, 149. Fed 734;
Van Gunden vs. Iron Co. 52 Fed. 838.

COMPLETE DISREGARD OF RULE 24.

Though Appellant has attempted in his specifications of error to specify as errors to be relied upon

by it, his assigned errors numbered II, IV, V, VI, VII, and XVII, he has failed to set forth his specifications as required by the rules of this Court, in this, that the Appellant has failed to give appropriate reference to the Record at which the alleged errors, if any occurred, the Record reference given by him being only to the page of the Record where the assignment of error is found.

With reference to a similar situation, Circuit Judge Sanborn said:

> "The court fails to find in the brief of counsel as required by rule 24, sub-section 2, sub-division 3 (188 Fed. XVI) any reference to the pages of the record where the demurrer of the railway company or the ruling upon it of which they complain, appears, and this court might well follow its established practice that 'where counsel for plaintiff in error considers the errors he assigns too trivial to warrant him in finding and citing the pages of the record and present them the court will not deem them of sufficient importance to require it to search for them'."
>
> *Thompkins vs. Mo. K. & T. R. Co., 211 Fed. 391.*

QUESTIONS ARGUED BY APPELLANT.

The Appellant has argued but two questions, first: whether or not there was substantial evidence that plaintiff became totally and permanently disabled while his insurance was in effect, and second: whether the trial court erred in admitting the testimony of Dr. Keenan, which testimony is set forth in their specifications of error. Thus we see that the specifications of error Numbers II and XVII, have not been argued at all; specifications Numbered IV and V, have

been argued. Specifications Numbered VI and VII have not been argued unless they are involved in the argument that there is no substantial evidence to justify the verdict of total permanent disability during the period of time the insurance was in effect.

UNARGUED SPECIFICATIONS OF ERROR.

The first specification of error set forth in Appellant's brief is an alleged error of failure to sustain the objection to the following question:

"Q. What does it say with reference to his ability to follow his occupation?

"MR. GARVIN: We object to that as incompetent.

"JUDGE PRAY: Overrule the objection.

"A. The answer is 'no'."

This specification of error, as is true of all specifications in Appellant's brief, is not drawn in conformity with the rules of this court, in that it has failed to give any reference to the record where the testimony appeared. The reference cited is (R. p. 174). Turning to this page of the record we find that it is a reference, not to the bill of exceptions, but to the portion of the record wherein is set forth the assignment of errors. Such a reference obviously is not a compliance with the rules as it does not assist the Court in finding the testimony which went before the question propounded, nor the questions thereafter, and standing by itself, without such reference, it is wholly impossible to say whether the question is proper or improper, and is, therefore, an improper assignment of error failing to conform to rule 11 and is likewise an improper specification of error.

Thompkins v. Mo. K. & T. R. Co. 211 Fed. 391.

Such specification should therefore be disregarded for two reasons:

First: Because it is not urged and argued.

Second: Because it is not a proper assignment of error or specification of error in that it is not drawn in accordance with rules 11 and 24.

An examination of the testimony discloses that the question might have been objectionable on the grounds that no proper foundation had been laid or upon other grounds than that specified, but certainly it was competent to show that a Veterans Bureau Doctor had, upon an examination made on behalf of the defendant as a Veterans Bureau Doctor reported that he was unable to follow his occupation. It is axiomatic that where counsel objects to a question without pointing out the particular wherein the question might be improper, or makes only a general objection without calling to the court's attention the particular in which the question is objectionable, he is in no better position than if he had made no objection at all. His objection is too general, it is equally axiomatic that where a wrong reason is assigned for the objection, and the question is not objectionable for the reason assigned, the Appellant is in no better position than if no objection had been made. This assignment of error should not be considered for the further reason no exception is shown by the specification of error to have been taken to the ruling of the Court.

The second unargued specification of error is that numbered XVII. This specification of error is faulty for the same reason that Specification Number II is faulty. In addition it is not a truthful assignment

of error and not a truthful specification of error. No request was made of the Court at the close of the testimony to render judgment for the defendant. The reference to the record is (R. p. 183). This fails entirely to show any such request. A reference to that portion of the record showing the close of the case discloses that immediately after the close of the case the court instructed the jury, (R. p. 153 and 157) and no motion of any nature, form or description was made.

Even if such a request was made of the Court it would have been improper in an action tried before a jury. The proper method or motion to be made would be one for a directed verdict, or demurrer to the evidence. Obviously the Court could not enter a judgment in an action at law being tried before a jury at the close of the evidence until after a verdict had been rendered by direction or otherwise.

The assignment and specification of error is improper on its face as being too general.

Columbia Pictures Corporation v. Lawton-Byrne-Bruner Ins. Agency Co., 73 Fed. (2d) 18.

SPECIFICATIONS ARGUED BY APPELLANT.

Hypothetical Question

Appellant specified as error a long hypothetical question asked of Doctor Keenan, which question is set forth on *pages 3, 4 and 5 of its brief*. The objection thereto and the ruling of the Court thereon are shown on *page 6 of its brief*. A mere perusal of the specifications of error shows that the ruling of the Court could not have been prejudicial for the simple reason that the question was not answered. The ob-

jection was stated by Mr. Garvin, the Judge overruled the objection, and Mr. Garvin took exception, but before any answer could be made Mr. Baldwin asked another question as follows:

> "I would like to know if it covers a period he was employed in a gainful occupation."

To which the Doctor answered:

> "I stated in my opinion he wouldn't be able to follow a substantially gainful occupation during that time."

The viciousness of allowing an Appellant to state an assignment or specification of error, as has been done by the Appellant herein, without referring to the page of the record where the alleged error transpired, is very definitely shown by this specification of error. After digging out the testimony we find that it transpired on *pages 77 to 80 of the Record*. Standing alone in a specification it might appear that the Doctor's answer to Mr. Baldwin's question referred to some unrecorded opinion in answer to the long hypothetical question, which is obviously what Appellant's counsel wishes this Court to infer. But a perusal of the testimony given immediately preceding the hypothetical question set forth in the specifications of error shows very definitely that the Doctor was referring to an opinion he had rendered in response to some other question. Immediately prior to the long hypothetical question being stated to the Doctor, he was asked certain other questions which were not objected to, and in response to which the Doctor did give an opinion (R. p. 76). He was there asked:

"QUESTION: Now, what would you say, Doc-

tor, with reference to his employability at the time you examined him and the interval?

"ANSWER: Well, I haven't seen him in this interval from June, '30, up until now.

"QUESTION: What would you say at that time you examined him in 1930,

"ANSWER: I would say no because I felt he was active.

"QUESTION: What do you say as to the employability now,

"ANSWER: My opinion is still the same."

With these questions in mind, the answer of the Doctor to Mr. Baldwin's question appearing in the specifications of error is very clear. A reference to the only opinion that he gave during the whole course of his testimony is the one quoted above, namely: that he was not able to follow a gainful occupation at the time he examined him.

This was then followed up with the specification of error numbered V, wherein he was asked if it would be injurious to his health, and the same objection was made, the same ruling, and this time the Doctor answered the question and showed conclusively just what he was talking about, because he answered as follows:

"Yes, it would be on both examinations I examined him."

Showing clearly that the Doctor referred back to the testimony that he has given about his employability at the time he examined him and not to any opinion not shown by the record that he might have given in answer to the long hypothetical question specified as error.

It was certainly proper to ask the Doctor whether

or not he could work at the time he examined him, and it was certainly proper that the Doctor give an opinion that he wouldn't be able to work at those particular times. In any event no prejudice can possibly result from the opinion of the Doctor no matter what viewpoint is taken, because he made no answer whatever to the first question, and to the second question, the answer cured any possible error that might have existed because, by his answer he merely stated that he was unable to work on the occasions that the Doctor had examined him.

These assignments and specifications of error should not be considered by the Court for the reason set forth above as a quotation from the case of *Thompkins vs. Mo. K. & T. R. Co. 211 Fed. 391*, wherein it is emphatically stated that assignments of error will not be considered unless the Appellant deems them of sufficient consequence to look up and refer to the page of the record where they occur.

Even though these hypothetical questions were answered they are entirely different hypothetical questions than those propounded in *U. S. vs. Stevens, 73 Fed. (2d) 695, (C. C. A. 9th); U. S. vs. Sullivan, 74 Fed. (2d) 799; U. S. vs. National Bank of Commerce of Seattle, 73 Fed. (2d) 721; U. S. vs. Baker, 73 Fed. (2d) 691; U. S. vs. Spaulding, 293, U. S. 498; U. S. vs. Steadman, 73 Fed. (2d) 706; U. S. vs. Provost, 75 Fed. (2d) 190; Hamilton vs. U. S. 73 Fed. (2d) 357.* In the cases cited by Appellant, which we have set forth above, numerous things appear that do not appear in this question. In the first place, in the questions held improper by these cases, counsel set forth a

conflicting state of facts. As an illustration, in the case of *U. S. vs. Stevens, 73 Fed. (2d) 695,* the Doctor was asked to assume as true the fact that the plaintiff signed a statement upon being discharged from the army that he had no reason to believe that he was then suffering from the effects of any wound, injury, or disability, or that he had any impairment of health and then was asked also to assume a state of facts which showed that statement to be untrue, thus asking the Doctor to perform one of the functions of the jury to determine which set of facts were true, and on all of the facts he was asked to state an opinion as to whether or not he was totally and permanently disabled, the direct question upon which the Jury would have to pass. Furthermore the term was defined for him by the departmental definition which, standing by itself, is no longer acceptable to the courts itself.

In all of these cases one or more of these faults are found and in this particular hypothetical question propounded to Dr. Keenan, none of them are found. Plaintiff's counsel here merely stated his theory of the case without any conflicting evidence, and upon that premise the Doctor was asked, not whether he was totally and permanently disabled, but merely whether or not he could follow a gainful occupation without injury to his health (R. p. 77 to 79). The Doctor ventured no opinion in response to the question asked.

Even if we were to consider something that doesn't appear of record, namely: that there was an answer to the question, or that the subsequent questions and answers inferentially answered the hypothetical ques-

tion, the cause should not be reversed on this ground.

SUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT.

Appellant in its argument has given over much of its brief to argument that the evidence is not sufficient to justify the verdict. Or, as he states in his brief, his argument is directed to the question of whether there is any substantial evidence that the plaintiff became totally and permanently disabled while his insurance was in effect. This argument cannot be considered by this Court for the further reason that there is no specification of error set forth in his brief that the evidence is insufficient to justify the verdict, and no specification of error set forth in his brief which can raise the question of the sufficiency of the evidence.

Specification of Error Number VI set forth a Motion for directed verdict made at the close of the plaintiff's case. That was denied and an exception to the ruling thereon taken, which is nothing more than a motion for non-suit, and when counsel fails to rest his case upon said motion and chooses to go ahead with his evidence he waives any error that might be predicated upon the denial of his motion.

Bogk vs. Gassert, 149 U. S. 17, 13 S. Ct. 738, 37 L. Ed. 631.

Accident Ins. Co. vs. Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. Ed. 740.

Bell vs. Union Pac. Ry. Co. 194 Fed. 366.

Lohman vs. Stockyards Loan Co. 243 Fed. 517.

Holder vs. U. S. 150 U. S. 91, 14 S. Ct. 10, 37 L. Ed. 1010.

Allen vs. Knott, 171 Fed. 76.
Collins vs. U. S. 219 Fed. 670.

Specification Number XVII, is not a specification that the evidence is insufficient to justify the verdict and as pointed out above, is not a truthful specification of error, as no request was made at the close of the testimony for judgment for the defendant and no action of the court was had upon any such request to which his exception could be taken.

Specification of Error number VII, which affirms that the Court erred in refusing to give his instruction to find a verdict in favor of the defendant, is not a specification of error that the evidence is insufficient to justify the verdict.

In Rule 11 of this Court, it is necessary that an assignment of error be separately and particularly set out. To raise the question of sufficiency of the evidence on appeal it is necessary that the assignment of error or specification of error specifically state wherein the evidence is lacking or insufficient to justify the verdict. This Court has stated:

> "It has been held by this Court that the assignment of errors must specifically state wherein the evidence is insufficient to justify the submission of the case to the jury. In Doe vs. Waterloo Mining Co., 70 Fed. 455, 461, 17 C. C. A. 190, 196, this Court held that: 'Rule 11 of this Court requires that the assignments of error shall be separately and particularly set out. The object of setting forth assignments of error is to apprise the opposite counsel and the Court of the particular legal points relied upon for a reversal of the judgment of the trial court. The attempt to make the assignment of error more particular in a brief is not proper. It is in fact an attempt to amend the record in

this particular without permission of the court'."

Bank of Italy vs. Romeo, 287 Fed. 5.

Surely there is nothing in this specification or assignment of error which in any way points out wherein the evidence is insufficient to justify the submission of the case to the jury. They have attempted to do, what the Court specifically disapproved, by their brief, point out that fact. Not having set forth in their brief any specification of error, which raises the question of the sufficiency of the evidence to justify the verdict, that question cannot be passed upon by this Court.

The question of the sufficiency of the evidence to justify the verdict cannot be passed upon by this Court for the further reason that no motion for a directed verdict was made at the close of all of the evidence. Before this Court will review the question of the sufficiency of the evidence to justify the verdict such a motion must be made at the close of all of the evidence, or the question must be brought sharply to the Court's attention by some proper motion made at that time.

Bank of Italy vs. Romeo, 287 Fed. 5 at 7;
China Press Inc. vs. Webb, 7 Fed. (2) 581;
Security National Bank vs. Old National Bank, 241 Fed. 1, at 6;
Lohman vs. Stockyards Loan Co., 243 Fed. 517;
Holder vs. U. S. 150 U. S. 91, 14 S. Ct. 10, 37 L. Ed. 1010;
Allen vs. Knott, 171 Fed. 76;
Collins vs. U. S. 219 Fed. 670.
Mansfield Hardwood Lbr. Co. vs. Horton, 32 Fed. (2d) 851.

It will be urged by counsel that the requested in-

struction set forth in its specification of error Number VII, wherein it is affirmed that the Court erred in refusing his requested instruction Number I,

> "You are instructed to find your verdict in favor of the defendant"

takes the place of a motion for directed verdict, and that their exception to the Court's refusal to grant said instruction sufficiently presented the question in the lower Court to authorize their presentation of the question of the sufficiency of the evidence to justify the verdict in this Court. However, it will be seen that such instruction was submitted with a series of five requested instructions to the Court after the close of the case and at the time the argument was about to begin, (R. p. 156) and that no ruling of the Court was made thereon until after arguments had been made and the instructions of the Court given, (R. p. 170) and then no direct ruling was made by the Court except if it was implied in the fact that the Court did not give that instruction to the jury. It was then that counsel took exception to the Court's refusal to grant said instruction (R. p. 170).

The record nowhere discloses that opposing counsel was apprised of the request before the argument on the case began.

To attempt to present this question in this fashion, and at the time it was presented in the lower Court in this case, comes too late. It has been repeatedly held that the inclusion of an instruction to find for the defendant in a series of requested instructions presented to the Court after the close of the case comes too late and cannot properly be granted.

Gilbert vs. Watts-DeGolyer Co. (Ill.) 48 N. E. 430;

Calumet Electric Ry. vs. Christenson, 48 N. E. 962;

West Chicago St. Ry. Co. vs. McCallum, 48 N. E. 424;

Ross vs. Lambert (Ind.) 137 N. E. 185;

Calumet Electric vs. Van Pelt (Ill.) 50 N. E. 678;

in re Easton's Estate (Calif.) 5 Pac. (2d) 635;

In discussing the matter, Judge Boggs, in the case of *Gilbert vs. Watts-DeGolyer Co. (Ill.) 48 N. E. 430,* says:

"The appellant, by introducing evidence to contradict the case made by the plaintiff (appellee), waived the exception taken by him to the action of the court in overruling the motion, entered at the close of the testimony offered in behalf of the plaintiff, to direct the jury to find for the appellant. *Railway Co. v. Velie, 140 Ill. 59, 29 N. E. 706; Railway Co. v. Van Vleck, 143 Ill. 480, 32 N. E. 262; Grimes v. Hilliary, 150 Ill. 141, 36 N. E. 977.* Upon the final submission of the case to the jury, appellant, among other instructions to be given to the jury, presented to the court the following: 'No. 6. The court instructs the jury that, the plaintiff having failed to make out a case which in law entitled it to recover, you shall find your verdict for the defendant.' * * * * If the appellant in the case at bar desired to save for consideration in this court the question whether, as a matter of law, the evidence was sufficient to warrant the submission of the case to the jury, he should, by a motion presented to the court, before submitting the case to the jury, have asked the court to exclude the evidence, and peremptorily direct the jury to return a verdict in his favor. Such question cannot be raised by including, in a series of instructions presented to the court to be given to the jury for

their guidance in applying the rules of law to the decisions of the question of fact raised by the evidence, an instruction declaring that the evidence is not sufficient to entitle the plaintiff to recover, and directing that a verdict be returned by the jury for the defendant.

In the case of *in re Easton's estate, 5 Pac. (2d) 635,* the California Court, in passing upon the question of whether or not the submitting of such an instruction constituted a request for a directed verdict under the provisions of *Section 629 of the Code of Civil Procedure,* flatly holds that the submission of such an instruction does not constitute a motion for directed verdict and in discussing the question said:

"In the present case, no such motion was made or presented. All that the respondents did was to hand to the court at the conclusion of the evidence, a paper reading as follows:"

They then set out the proposed instructions and then continued:

"Respondents contend that the submission of said paper to the court under the circumstances above stated, was sufficient to meet the demands of the first clause of Section 629, which requires that a motion for directed verdict shall be made. We are unable to sustain this contention. In its nature, a motion for directed verdict is the same as a motion for non-suit, a demurrer to the evidence, the right of the court to direct a verdict, touching the condition of the evidence, being absolutely the same."

VERDICT AMPLY SUSTAINED BY THE EVIDENCE.

A mere scintilla of evidence is not sufficient to require the submission of the case to the jury but if there is any evidence upon which a jury can properly

proceed to find a verdict for the party producing it, it is proper for the court to submit the case to the jury and no error can be predicated upon the court's failure to take the case from the jury. *Gunning vs. Cooley, 281 U. S. 90, 50 S. Ct. 251, 74 L. Ed. 720.*

Issues that depend upon the credibility of witnesses and the effect or weight of evidence are to be decided by a jury and in determining whether a case should be submitted to the jury the Court must assume that all of the evidence of the party against whom he is requested to direct a verdict provides all that it reasonably may be found sufficient to establish, for, from such facts thus established all inferences that are fairly deductible therefrom must be made. *Gunning vs. Cooley 281 U. S. 90, 50 S. Ct. 251, 74 L. Ed. 720.* Where uncertainty as to the existence of a fact arises from a conflict in the testimony or because the facts being undisputed, fair minded men will honestly draw different conclusions from them. The question is not one of law but of fact to be settled by a jury. *Gunning vs. Cooley 281 U. S. 90, 50 S. Ct. 251, 74 L. Ed. 720.*

Analyzing the evidence in the light of these well settled rules of law we find that it is ample to sustain a verdict on behalf of the plaintiff. Plaintiff enlisted in the United States Navy December 15th, 1917 and at the time of enlistment was working on a pile driving crew and doing any kind of work that came to hand and was able to do any and all kinds of work done on a pile driving crew (R. 115). He had never had anything but minor ailments from childhood up and did not lose any work on account of lung trouble (R. 16). Immediately prior to enlistment he had been

examined for enlistment in the Marine and passed the examination (R. 16), and likewise was examined by the medical authorities for admission in the Navy and passed the physical examination (R. 16). While at Goat Island weather was damp and foggy and he caught a severe cold but continued to drill and do the regular duties of a seaman for sometime thereafter without reporting on sick call (R. 16 and 17) and was transferred to San Diego and four or five days after he was transferred reported on sick call when he found that his cold was continually getting worse (R. 60). Immediately upon reporting for sick call he was sent to the hospital where he was in bed for about a month (R. 17) and sometime thereafter went before a board of medical officers and was given a medical survey out of the Navy by reason of being physically unfit for further service in the Navy (R. p. 17). He applied for and was granted $5,000.00 War Risk Insurance (R. p. 17). Upon his return home from the Navy he was pretty sick and went to see a doctor—a Dr. Chamberlain who treated him and there was a period of three months before he attempted to go to work (R. p. 20). Then he went to his old foreman to get a job but was unable to take the job that he had before but got a job such as a kid or an old man could do (R. p. 21), remaining on the job until November but in the interim was off a few days at a time, lots of times. Would be unable to work and would go home (R. p. 21). In November he got sick and was sent to the hospital at Belt and was there for more than a month and then after getting out of the hospital remained with his brother

for another three weeks (R. p. 21), and went back to the same foreman for a job who gave him a job as night watchman sitting there watching material on the job and flagging the train which job lasted for about a month (R. p. 22). He began on this job in the spring possibly in March and remained there until June when he had to quit and go back to Belt and take further treatment from the doctor and remain under the doctor's care until September when he again attempted to work for the railroad from September until November then again had to quit because of his health and having heard of the Government doctors went to them for treatment and they sent him to the tuberculosis hospital at Galen. At this time he had a wife and no source of income. He had not been able to earn enough to maintain his family while he would be in a sanitarium (R. p. 23). He came home and he and his wife resided with his wife's folks all that winter (R. p. 23). In the spring he went to see the Government doctors and they sent him to Wadena in June of 1920. He returned home and was sent to Prescott, Arizona for examination being there but a few days (R. p. 23). He was sent to the sanitarium at Galen in April of 1921 and remained there until some time in August and was transferred to the new hospital at Fort Harrison and remained there until October of 1921 and returned home and about the first of December, 1921 was sent to St. Paul to the Public Health Service Hospital from whence they transferred him to Prescott, Arizona where he remained until April of 1922 and thereafter he remained at home taking the prescribed treatment of rest on out

patient treatment, (R. p. 24), taking regular periods of rest the same as you do in the hospital and having rich foods. He attempted to do no work while on this out patient treatment. This out patient treatment lasted until some time in the year 1929 when he went to a hospital. In the interim he attempted to do a few days work for a brother in a store in Portland. In 1928 he attempted to do some work for a Mr. McConkey in a store in Belt at temporary employment, just now and then. He worked two or three days, sometimes one, sometimes four days; never on the average of more than twelve days a month without regular hours of employment. Sometimes he would go to work at seven or eight in the morning and other times about noon all depending upon the condition of his health. When he worked it would make him very tired and nervous and he could not sleep at nights and lots of times he would not be able to go back the next day even if they needed him (R. p. 25). This continued in this fashion until April, 1929. He wasn't paid sufficient to maintain his family on and did not get more than $50.00 per month (R. p. 26). In April 1929 and until September 1929 his wife opened a store and he assisted her but he was not able to work in the store steadily. They had living quarters in the back of the store and his wife was there at all times. His wife did the biggest share of the work. In September after five months of this attempt he sold the place and went to the Veterans Bureau Hospital at Fort Harrison and was in the hospital receiving treatment for a period of twenty months. He got out of the hospital in June, 1931 and remained at home until the

following November unable to do any work. Then he got a job in the hospital washing dishes for a period of three or four weeks and had to quit because it was too hard and they gave him a lighter job as an orderly at which he worked for about a month or six weeks and then got sick and was put in bed as a patient and remained there for three weeks. After getting up out of the hospital he remained at home for ten days or two weeks (R. p. 27), and then went back to work on the 20th of March and lasted until some time in July, 1932 and asked to be relieved of duty and given his thirty days off (R. p. 27) but was informed that they could not do that so they transferred him to an easier job and he remained on until about Christmas time when it got so he could not sleep and he could not stand it and he had to quit. Since which time he has been unable to do any work (R. p. 28). While still in the army it was determined that he was suffering from pulmonary tuberculosis and on February 19th, 1918 long before the Armistice was signed and while the war was still on and while the emergency existed and the need of men was great, he was discharged by a medical board of review as being physically unfit for further service in the Navy (R. p. 90). He came home and immediately went under the care of a doctor and remained almost continuously under the care of a doctor in hospitals or on out-patient treatment prescribed by the Government as above outlined except for very short intervals of work when his health repeatedly broke down on all occasions on which such work was attempted. There was a distinct conflict in the testimony by the doctors and some of the records. The

conflict between records and statements of the doctors and the testimony of the plaintiff but all such conflicts must be resolved in favor of the plaintiff. The facts of this case are almost identical with that decided by Judge Mack while sitting as a member of this court in the case of *U. S. vs. Jensen, 66 Fed. (2nd) 19.* Whatever difference there may exist in the facts show the case at hand to be far stronger than that decided by Judg Mack. The periods of work in this case are about one half as large as the periods of work in the Jensen case. The periods when plaintiff was absolutely unable to do anything were about three times as large as like periods in the Jensen case. Clearly the situation here fits into the analysis of what constitutes total permanent disability made by the Supreme Court of the United States in the case of *Lumbra vs. U. S. 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492,* wherein Chief Justice Butler said "It may be assumed that occasional work for short periods by one generally disabled by impairment of mind or body does not as a matter of law negatively show for permanent disability." Here his sporadic periods of work has been of minor duration over a period of 16 years at long intervals intervening between each period of work.

This Court cannot say as counsel have argued that tuberculosis being a curable disease proof of the existence of tuberculosis alone prior to the lapse of insurance cannot be made the foundation of a claim for total and permanent disability. As the Supreme Court said in the case of *Lumbra vs. U. S. 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492.* What might be a very slight disability in one person may totally and permanently

disable another. Consequently the facts of each particular case as they effect each particular individual must be determined and this can only be done by a jury and cannot be stated as a hard and fast rule of law. As Chief Justice Butler says "what might totally and permanently disable one man would merely be an incentive to greater accomplishment in another."

No assumption can be made as counsel has attempted to do in his brief on page 27 that plaintiff was suffering from incipient tuberculosis at the time of his discharge in March, 1918. He was suffering from tuberculosis to the extent that he was surveyed out of the Navy by a board of medical survey as physically unfit for service in the Navy. They made no statement that his tuberculosis was incipient or as to what stage it was in except that it had reached such a stage that he was unfit for service at a time when men were sorely needed in the Navy.

Counsel is extremely unfair in his quoting a portion of the testimony of the witness as to his reason for not bringing suit earlier. He stated more than that they quoted to the effect that he did not know, he couldn't give the exact reason. He stated that one of the reasons he didn't bring suit earlier was:

> "Because I didn't know that you could sue until that day." (R. p. 29.)

The record does show that as early as 1926 he was having a very serious fight with one Dr. Dolan about whether or not he was totally and permanently disabled and that he was insisting very strenuously that he was totally and permanently disabled (R. p. 44 to 48). The fact that he was insisting that he was totally and

permanently disabled was brought up in the trial of this case as an indication that he was no good and a loafer and that because he did insist that he was entitled to it was a proof that he was lazy and didn't want to do anything (R. p. 44 to 49).

There is something further in the record, however, to show why the man didn't know until immediately prior to bringing the suit that he was entitled to bring such a suit, and that is the fact that the Veterans Bureau and the Director thereof very pointedly, in the certificate issued to him, warned him against consulting or employing an attorney or other person about the benefits that might exist under the war risk insurance certificate (R. p. 19 and 20).

The law itself made it almost impossible for one to earlier have received advice inasmuch as they made it a criminal offense for a man to get more than $3.00 worth of advice in the act as it originally stood, *(see War Risk Insurance Act of Oct. 6, 1917, and the Act amendatory thereof of May 20, 1918),* and which later permitted him to procure $10.00 worth of advice by amendment of the act. *(See World War Veterans Act of June 7, 1924).*

CONCLUSION.

This appeal should be dismissed and judgment of the lower court affirmed.

First: Because no specifications of error have been set forth in the brief of Appellant in accordance with rules 11 and 24 in that the specifications of error which are set forth in the brief of Appellant have no appropriate references to the record or transcript where it is claimed such error occurred, and further in that the

specifications of error, other than those assigning error on questions of admission of evidence, are so general that they do not conform with Rule 11 of this Court, and as to those assigning error on the admission of testimony, the questions objected to were not answered or no exception was observed to the rule of the court thereon.

Second: On the further ground that the bill of exceptions herein failing to show that it was settled and allowed within the time allowed by the rules of the Court cannot be considered herein and no specifications or assignments of error have been made which are necessarily predicated upon said bill of exceptions.

If the Court considers the appeal it must affirm the judgment of the lower court for the reason that there is no specification of error which would raise the question of the sufficiency of the evidence, and the Appellant is barred herein from raising the question of the sufficiency of the evidence for the reason that he did not, at the close of all the evidence, renew his motion for directed verdict, or by some appropriate method direct the question sharply to the court's attention, and no error was committed in rulings on the admission of testimony which are embraced in the only other specifications of error, and because in the last analysis the verdict of the jury was amply sustained by the facts proven.

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